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No. _____

In the
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

John K. Haggerty, *Petitioner*,

v.

City of Mountain View and State of California, *Respondents.*

On Petition for a Writ of Certiorari to the California Court of Appeal for the First Appellate District , Division One

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Are pre-employment racial inquiries by local governments before the oral interview stage of the public hiring process (such as California Government Code Section 1233 authorizes) constitutional under the Equal Protection Clause of the 14th Amendment to the United States Constitution?

2. Are statutes, such as California Government Code Section 1233, which authorize governments to ask persons to classify themselves racially, reviewed under the Strict Scrutiny Test set forth in *Adarand Constructors, Inc., v. Pena*, 515 U.S. 200 (1995)?

3. How is the term, "subjecting [a] person to unequal treatment", in *Adarand, supra*, at 224, to be interpreted?

4. Is California Government Code Section 1233, *supra*, constitutional under either the Strict Scrutiny Test or the Rational Basis Test?

5. Under what circumstances, if any, may a government constitutionally hire someone other than the *most* qualified applicant for a position?

LIST OF THE PARTIES

All of the parties to this action are named in the caption of this Petition.

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PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FOR THE FIRST APPELLATE DISTRICT, DIVISION ONE

John K. Haggerty respectfully petitions for a writ of certiorari to review the judgment of the California Court of Appeal for the First Appellate District, Division One, in this case.

OPINION BELOW

The opinion of the California Court of Appeal (App., *infra*, 1a-10a) and the judgment of the trial court (App., *infra*, 12a-15a) are unreported.

JURISDICTION

The California Court of Appeal entered its judgment on April 9, 1999. (App., *infra*, 1a.) The California Supreme Court denied review on June 30, 1999. (App., *infra*, 11a.) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(a).

STATUTORY PROVISION INVOLVED

California Government Code Section 1233 ("Section 1233") provides, in relevant part, that "applicants for employment by . . . public agencies may be solicited to voluntarily declare their ethnic identification [sic], provided this information shall be used for research and statistical purposes only." (The full text of this statute is set forth at App., *infra*, 16a.)

STATEMENT

Section 1233, *supra*, enacted in 1974, authorizes every local government in California to ask job applicants to classify themselves into separate racial groups before the granting of oral interviews. The constitutionality of such a law has never been reviewed in a reported opinion. Purportedly "racially neutral", "separate-but-equal" measures of this kind are plainly unconstitutional under any test in that they subject millions of applicants for public employment to unequal treatment in the granting of oral interviews without being rationally related to any legitimate governmental interest.

Before discussing the reasons why this petition should be granted, petitioner will describe the factual, statutory, and procedural background of this case.

Factual Background: In November 1996, when petitioner applied to respondent City of Mountain View ("Mountain View"), a local government in California, for the position of Deputy City Attorney, it asked him "to complete an ethnic identity form as a part of the application process" prior to its selection of applicants for oral interviews. (Clerk's Transcripts ("CT") 32-33.)

When petitioner asked Mountain View under what authority it was making this inquiry, it could only cite Section 1233. (CT 17-18.) Later, during the discovery phase of this action, Mountain View remained unable to cite any other statutory authority for its direct pre-employment racial inquiries. (CT 625-626.)

According to the Statistical Abstract of the United States for 1995 there were 1,108,000 full-time local government employees in California in 1992. (CT 616.) California governments, including Mountain View and respondent State of California ("the State"), use the following basic three step hiring process: (1) review application forms; (2) conduct oral interviews; and (3) hire. (CT 408-418, 606.)

Statutory Background: Section 1233 was enacted as an urgency measure in 1974 at the request of local government organizations in California. (Stats. 1974, ch. 573, sect. 1; CT 576.) The State's civil rights enforcement agency, known at that time as the State Fair Employment Practices Commission (SFEPC), opposed the enactment of Section 1233 "on the grounds that such pre-employment information could be used to the detriment of the ethnic minorities." (CT 564.) Before 1974 all pre-employment racial inquiries were illegal in California. (See former California Labor Code Section 1420(c)(Stats. 1959, ch. 121, sect. 1); former California Government Code Section 19704 (Stats. 1945, ch. 123, sect. 1).)

Section 1233 begins with the following language: "Acting in accordance with Executive Order 11246 (30 FR 12319), as amended, . . . " Yet nothing in that federal

Order requires, authorizes, or even mentions asking job applicants to classify themselves racially. (CT 550-559.) Indeed, in a reported opinion of its Attorney General, the State concedes that no federal "regulation purports to permit or require any 'pre-employment' [racial] inquiry which is otherwise prohibited under" state law. (64 Ops. Cal. Atty. Gen. 728, 732 (1981).)

The second paragraph of Section 1233 provides as follows:

> "A separate or tear-off portion of the application shall be written and shall be kept in a separate nonpublic file, accessible only to those charged by the personnel director with research responsibility, for the purpose of discharging that responsibility. The separate sheet or tear-off may contain a number to be used as a cross index to the application. *Safeguards to prevent misuse of the information shall be approved by the State Fair Employment Practice Commission, including the point in time at which the separate sheet or tear-off portion of the application shall be maintained in separate nonpublic file.*" (App., *infra*, 16a (emphasis added).)

Despite the above emphasized language, the State has conceded that it "is not aware at this time of any safeguards that have been approved" by the SFEPC or any other agency. (CT 584.) There are, at most, two regulations which relate in any way at all to Section

1233, namely, California Code of Regulations, Title 2, Sections 7287.0(b) and 7287.3(b),(c) (App., *infra*, 17a-18a). However, neither of them provides for any specific "[s]afeguards to prevent misuse of the information" which Section 1233 provides. (Section 1233.)

Procedural Background: On July 9, 1997, petitioner filed a Complaint for Declaratory and Injunctive Relief against Mountain View and the State with the San Francisco County Superior Court. In that Complaint he alleged that Section 1233 and the related regulations, *supra*, are unconstitutional under the 14th Amendment to the United States Constitution in that they: (1) do not serve "a compelling or legitimate governmental interest"; (2) are "not narrowly tailored"; and (3) "actually increase the risk of racial discrimination" (CT 3, 8) such that they pass neither the Strict Scrutiny Test nor the Rational Basis Test.

More specifically, petitioner alleged that, by authorizing "racial information about applicants to be maintained at the very same agency where the hiring happens" Section 1233 "enables governmental agencies to discriminate on racial grounds at a much earlier and less conspicuous stage in the hiring process" (i.e., prior to the selection of applicants for oral interviews) than they otherwise could. (CT 6.)

Petitioner prayed for: (1) a declaration that Section 1233 is unconstitutional; and (2) an injunction enjoining: (a) Mountain View from asking job applicants to classify themselves racially; and (b) the State from authorizing local governments to ask job applicants to classify themselves racially. (CT 12-13.)

The San Francisco County Superior Court granted respondents' motion for a judgment on the pleadings on February 10, 1998, whereupon a Judgment of Dismissal was entered on February 26, 1998. (App., *infra*, 12a-15a.) The California Court of Appeal for the First Appellate District, Division One, filed its opinion affirming that judgment on April 9, 1999. (App., *infra*, 1a-10a.) On May 11, 1999, petitioner filed a Petition for Review with the California Supreme Court, asking it to review the constitutionality of Section 1233, which was denied on June 30, 1999, as was the State's request that the opinion of the California Court of Appeal, *supra*, be published. (App., *infra*, 11a.)

REASONS FOR GRANTING THE PETITION

I. ALL STATUTES ESTABLISHING RACIAL CLASSIFICATIONS SHOULD BE REVIEWED UNDER THE STRICT SCRUTINY TEST.

In its landmark decision, *Adarand Constructors, Inc., v. Pena*, 515 U.S. 200 (1995), this Court ruled that every use of racial classifications by a governmental actor must pass the Strict Scrutiny Test as follows:

> "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify *any* racial classification subjecting that person to unequal treatment under the *strictest* judicial scrutiny.
>
> . . .
>
> Accordingly, we hold today that *all* racial classifications, imposed by whatever federal, state, or local governmental actor,

> must be analyzed by a reviewing court under *strict* scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." (*Id.*, at 224, 227 (emphases added).)

Adarand overruled *Metro Broadcasting, Inc., v. FCC*, 497 U.S. 547 (1990)(which had held that "benign" uses of racial classifications by the federal government for "remedial" purposes were reviewed under a lesser level of scrutiny), describing *Metro* as "a significant departure from much of what had come before it" that "undermined important principles of this Court's equal protection jurisprudence . . . stretching back over 50 years". (*Id.*, at 227, 231 (referring to *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)("[d]istinctions between citizens solely because of their ancestry are by their very nature odious") and *Korematsu v. United States*, 323 U.S. 214, 216 (1944)(racial classifications must receive the "most rigid scrutiny")).)

In this case respondents Mountain View and the State argue that Section 1233 (which authorizes every local government in California to ask applicants for public employment to classify themselves into separate racial groups) should not be reviewed under the Strict Scrutiny Test because (they argue) it is "a race-neutral statute" such that only "the rational basis test applies." (CT 371.) This argument must fail from the outset because it ignores the basic constitutional principle that "separate-but-equal", "race-neutral" laws are "inherently unequal" even when they are applied "equally". (*Brown*

v. Board of Education, 347 U.S. 483, 495 (1954). See also *Loving v. Virginia*, 388 U.S. 1, 8, 11 (1967).)[1]

Nevertheless, the California Court of Appeal adopted respondents' argument, relying heavily upon two state cases neither of which involved racial classifications (i.e., *Tobe v. City of Santa Ana*, 9 Cal.4th 1069 (1995)(involving an anti-camping ordinance), and *Arcadia Unified School District v. State Dep't of Education*, 2 Cal.4th 251 (1992)(involving classifications based on wealth). (See App., *infra*, 3a-4a, 6a-8a.) Indeed, that court proceeded to hold that *petitioner* had the burden of showing that Section 1233 was unconstitutional. (*Id.*, 4a.) This is not in accord with the holding in *Adarand*, *supra*, that *governments* must establish the constitutionality of the racial classification measures they choose to enact. (515 U.S. at 224.)

Furthermore, petitioner submits that *Adarand*, *supra*, actually establishes two levels of strict scrutiny for racial classifications, namely, whereas "all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny" (515 U.S. at 227), those "subjecting [persons] to unequal treatment" must be reviewed "under the *strictest* judicial scrutiny" (*id.*, at 224 (emphasis added)). If this is so, Section 1233 should receive "the strictest judicial scrutiny" because, as

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[1] Respondents' argument must also fail, as discussed more fully, *post*, at 9-19, because Section 1233: (a) is not a "race-neutral" law in that it subjects job applicants to racial discrimination; and (b) does not even pass the Rational Basis Test.

discussed, *infra*, the racial classifications[2] it authorizes subject persons to unequal treatment.

Accordingly, this petition should be granted because a state court "has decided an important federal question in a way that conflicts with relevant decisions of this Court" regarding the appropriate standard of constitutional review for racial classification statutes. (Supreme Court Rule 10(c).)

II. PRE-EMPLOYMENT RACIAL INQUIRIES, SUCH AS SECTION 1233 AUTHORIZES, SUBJECT PERSONS TO UNEQUAL TREATMENT.

Direct pre-employment racial inquiries of the kind Section 1233 authorizes clearly subject persons to unequal treatment by allowing governmental entities to engage in racial discrimination at a much earlier stage in the public hiring process (i.e., before the selection of job applicants for oral interviews) than they otherwise could. Without the sensitive information those inquiries pro-

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[2] No one has disputed that Section 1233 involves the use of racial classifications. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED, 417 (1966), defines the term, "classification", as "the act or method of distributing into groups". Section 1233, itself, refers to applicants as members of a racial "group". (App., *post*, 16a.) "Race defines groups." (*Ho by Ho v. San Francisco Unified School Dist.*, 147 F.3d 854, 858 (9th Cir. 1998).) The State, itself, once referred to Section 1233 as a "self-classification system". (CT 594.) Nor did the Court of Appeal deny that Section 1233 establishes a system in which applicants for public employment are asked to classify themselves into separate racial groups by indicating, "I am African-American", "I am Asian-American", etc.

vide, entities would remain unable to discriminatorily "help" applicants obtain oral interviews. They would have to wait until an applicant arrived at the interview, itself, before they could ascertain his or her race by observation. Without laws, such as Section 1233, the most qualified applicants are at least guaranteed of making it to an oral interview. Laws, such as Section 1233, take that guarantee away from every American.[3]

While it is unknown and unknowable whether every California local government uses Section 1233 to engage in racial discrimination, it is clear that Section 1233 enables each such entity to engage in that conduct at a much earlier stage in the public hiring process, thereby "subjecting [persons] to unequal treatment". (*Adarand*, *supra*, 515 U.S. at 224.) The Court in *Adarand* did not discuss how the term, "subjecting that person to unequal treatment", should be interpreted. Petitioner submits that it should be interpreted to include, not only measures which "expressly mandate" unequal treatment, but also measures, such as Section 1233, which "expose" persons to unequal treatment by "always increasing the risk" of that treatment.

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED, 2275 (1966), defines the verb, "subject", in

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[3] They do so even when applicants decline a hiring entity's request to "declare" their race because, if such an entity is intent upon discriminating in favor of applicants who identify themselves as members of Race A, then members of Race B will be racially discriminated against whether they identify themselves or not.

part, as follows: "**2a :** to make liable : PREDISPOSE <his conduct ~ed him to needless suffering> . . . **4 :** to cause to undergo or submit to: make submit to a particular action or effect : EXPOSE <he hated to ~ his wife to such company>". Section 1233 causes applicants for public employment to undergo direct racial inquiries that expose them to racial discrimination.

The unequal treatment to which racial inquiries by a government subject persons is not merely "hypothetical" as the California Court of Appeal and respondents have suggested. (See CT 379; App., *infra*, 8a.) It is real. For example, in the recent case of *Kidd v. California*, 62 Cal.App.4th 386 (1998), it was established beyond a doubt that the State used California Government Code Section 19705 (which allows the state government to make the same pre-employment racial inquiries as Section 1233 allows local governments to make)[4] to discriminate in its hiring decisions as follows:

> "The Department [of Fish and Game], as the appointing power, *admitted* it has received the names of those individuals supplementally certified along with notations concerning sex and ethnicity. Additionally, the [State Personnel] Board has *admitted* providing these notations for the Department's *use in its hiring decisions*." (*Id.* at 405 (emphases added).)

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[4] Like Section 1233, California Government Code Section 19705 was enacted in 1974 and its constitutionality has never been reviewed in a reported opinion.

Similarly, in *Ho by Ho v. San Francisco Unif. School Dist.*, 147 F.3d 854, 858 (9th Cir. 1998), it was undisputed that a local school district had asked the guardians of its students to identify "the racial/ethnic composition of [those] students" and used the responses it received to assign those students to schools in a racially discriminatory fashion.

In this case discovery revealed that it was the stated policy of Mountain View to use the racial information it received to assign "plus factors" in favor of job applicants of certain races and gender. (CT 673-676.) Discovery also revealed that Mountain View stored the "Ethnic Identity Forms" it received in this case in the same building as it made its hiring decision and that two of its employees, who "looked at" those forms, "may have [also] read" the other forms submitted by job applicants. (CT 611, 629, 631.)[5]

The California Court of Appeal relies too heavily upon a proviso in Section 1233 which states that "it shall be unlawful . . . to use this information to discriminate against" job applicants. (See App., *infra*, 1a-2a, 7a.) Respondents were unable to identify a single specific civil or criminal penalty enforcing this proviso except to say that "sanctions for employment discrimination are

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[5] Ironically, Mountain View did not make any notations of the race of the applicants it selected for oral interviews, stating that "[t]o do so would give rise to an inference of discrimination." (CT 631.) Petitioner cannot know for certain whether or not Mountain View discriminated against him in its selection of applicants for oral interviews. But Section 1233 certainly enabled Mountain View to do so in furtherance of its stated policy.

contained generally in the Government and Labor Codes." (CT 585.) Toothless provisos of this kind can never prevent or even significantly deter entities, already intent upon treating persons unequally, from using Section 1233 to further that pre-existing intent. *Moreover*, the fact that the California legislature saw fit to expressly prohibit discriminatory uses of the racial information Section 1233 provides indicates that it, too, recognized that Section 1233 subjects persons to unequal treatment in public hiring.

The unequal treatment to which pre-employment racial inquiries expose persons is also made clear by the fact that the federal Equal Employment Opportunity Commission (EEOC) does not authorize or approve of pre-employment racial inquiries. The State concedes that no federal "regulation purports to permit or require any 'pre-employment' inquiry which is otherwise prohibited under" state law. (See, *supra*, at 4.) Even as to *current* employees, the EEOC prefers what it calls "visual surveys" and frowns upon direct inquiries as follows:

> "An employer may acquire the race/ethnic information necessary for this section either by *visual surveys* of the work force, or from *post-employment* records as to the identity of employees. . . . However, although *the Commission does not encourage direct inquiry as a method of determining racial or ethnic identity*, this method is not prohibited in cases where it has been used in the past, or where other

> methods are not practical, provided it is not used for purposes of discrimination." (CT 713 (EEOC Instruction Booklet) *(emphases added).)*

The EEOC's reluctant toleration of *post*-employment racial inquiries clearly indicates that it does not approve of the kind of *pre*-employment racial inquiries which Section 1233 authorizes.[6]

Finally, the statutory history of California also demonstrates that racial inquiries (such as Section 1233 authorizes) subject persons to unequal treatment. As noted, *supra*, at 3, before 1974 all pre-employment racial inquiries in California were illegal. The State's civil rights agency, the SFEPC, opposed the enactment of Section 1233 precisely because it "could be used to the detriment of the ethnic minorities." (CT 564.) To this day, California landlords are not allowed to ask prospective tenants any of the racial questions which California Government Code Sections 1233 and 19705 allow California state and local governments to ask their prospective employees. (See California Government Code Section 12955(b).)

In summary, state and federal cases, the discovery conducted in this case, Section 1233, itself, the policy of

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[6] It should also be noted that direct inquiries into the race of *current* employees do not subject them to unequal treatment in public hiring because: (1) current employees are, by definition, already hired; and (2) such inquiries cannot subject them to unequal treatment in promotions because their employers can already ascertain their race by what the EEOC calls "visual surveys" which they cannot do with respect to job applicants before an oral interview.

the EEOC, and the statutory history of California all demonstrate that Section 1233 is a measure which "subject[s persons] to unequal treatment" such that it should be reviewed by this Court "under the *strictest* judicial scrutiny." (*Adarand, supra*, 515 U.S. at 224 (emphasis added).)

III. STATUTES, SUCH AS SECTION 1233, PASS NEITHER THE STRICT SCRUTINY TEST NOR THE RATIONAL BASIS TEST.

For legislative classifications to be valid under the Equal Protection Clause they must be "narrowly tailored measures" that "further compelling governmental interests" (under the Strict Scrutiny Test) in the case of "all racial classifications" and, at a minimum, rationally related to a legitimate governmental interest (under the Rational Basis Test) in all cases. (*Adarand, supra*, 515 U.S. at 227.) Section 1233 passes neither of these tests because it does not further nor is it rationally related to any governmental interest.

The only interest respondents claim is served by Section 1233 is the generation of racial statistics for use in litigation and socioeconomic analysis. (See, *e.g.*, the State's Respondent's Brief (RB) at 20-28.) Section 1233, itself, states that the information it provides "shall be used for research and statistical purposes *only*." (Emphasis added.) In its discovery responses the State described this interest as "legitimate" but refrained from calling it "compelling". (CT 683-684.) In its opinion the California Court of Appeal did *not*: (a) hold that Section 1233 served any interest other than the generation of racial statistics; (b) refer to that interest as compelling;

or (c) address the statistical reliability of the racial information which Section 1233 generates.

A. Section 1233 Is Incapable of Providing Reliable Statistical Information. In their discovery responses respondents admitted that they knew of no studies addressing the statistical validity of "voluntary" racial self-classification systems such as Section 1233 authorizes. (CT 593-594, 604-606.) In the proceedings below petitioner initially noted that, if only 20 percent of the applicants for a position "voluntarily declare" their race (using the language of Section 1233), then nothing is known about the remaining 80 percent, to which the State responded by observing that petitioner "apparently is unaware of *sampling* in survey research." (The State's RB at 24 (emphasis in the original).)

Petitioner was aware of sampling and its uses in marketing, politics, etc., but noted "that for a sample to produce statistically reliable information it must be *random*." (Petitioner's Reply Brief at 17 (emphasis in the original).) "Random sampling" has been well known and understood for many years. In 1953, for example, the AMERICAN COLLEGE DICTIONARY, 1002, defined that two worded term as follows:

> "the drawing of a sample from a statistical population *in which all members of the population have equal probabilities of being included in the sample*." (Emphasis added. See also WEBSTER's, *supra*, at 2008 (defining the term, "sample", as "a representative portion of a whole").)

The samples Section 1233 generates cannot be random under this definition where governments make it clear that they are eager to hire in favor of certain races. For example, Mountain View made it clear in its public papers that it wished to hire in favor of certain races. (See CT 641-657, 673-676.) When this occurs people of the favored races will always have an incentive to declare their race while people of the non-favored races will always have an incentive not to declare their race.

Moreover, not only is Section 1233 incapable of providing reliable statistics, it actually produces statistics that are distorted. For instance, if a city made it known that it was eager to hire persons of Race A for a position and there were 100 applicants for that position (10 of whom were of Race A) and only 20 of those applicants (including all 10 who were of race A) declared their race, then this sample of 20 would inaccurately indicate that 50 percent of the applicants were of Race A whereas, in truth, only 10 percent were of that race.

Thus, as a matter of basic statistics, Section 1233 is not even rationally related to the single governmental interest respondents and the California Court of Appeal have offered for it such that it fails both the Rational Basis Test and the Strict Scrutiny Test.[7]

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[7] It should be noted that Section 1233 also fails the narrowly tailored prong of the Strict Scrutiny Test in that it: (a) allows sensitive racial information to be stored and maintained at the same agency where the hiring happens; and (b) applies without distinction or limitation to every local government in California.

B. No Case Law Upholds The Use Of Direct Pre-Employment Racial Inquiries. In its opinion the California Court of Appeal cites only three cases for the general proposition that the collection of racial statistics can serve a valid legislative purpose. (See App., *infra*, 8a (citing *Caulfield v. Board of Education*, 583 F.2d 605 (2nd Cir. 1978); *United States v. New Hampshire*, 539 F.2d 277 (1st Cir. 1976), *cert. denied*, 429 U.S. 1023; *Alioto's Fish Co. v. Human Rights Commission of San Francisco*, 120 Cal.App.3d 594 (1981)).) Each of those cases pre-date the decision of this Court in *Adarand*, *supra*, 515 U.S. 200, by at least 14 years. Moreover, the California Court of Appeal, itself, acknowledged that each of them involved "the collection of information on race *in other contexts generally*". (App., *infra*, 8a (emphasis added).)[8] For instance, *Caulfield* and *New Hampshire*, *supra*, involved current employees, not job applicants, such that they are plainly distinguishable.[9]

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[8] It should be noted that, while petitioner contends every use of racial classifications by the government (including the collection of racial data) should be reviewed under the Strict Scrutiny Test, he is not contending that such uses can never pass that test. As this Court, itself, has noted, the test is not "'strict in theory, but fatal in fact.'" (*Adarand*, *ante*, 515 U.S. at 237.) For example, a court could readily hold that recording the race of prison inmates and robbery suspects serves the compelling interest which all governments have in apprehending prison escapees and criminals.

[9] See *ante*, at 14, n. 6. Pre-employment racial inquiries "subject[] [persons] to unequal treatment" whereas post-employment ones do not. (*Adarand*, *ante*, 515 U.S. at 224.)

Alioto's Fish Co., supra, involved a local government which had included in its leases with restaurant owners clauses requiring them to: (a) file reports of the race of their employees and job applicants; and (b) meet specified "goals" in the hiring of "minorities". (120 Cal.App.3d at 602.) *Alioto's* is distinguishable in several respects. First, it did not involve any governmental employers. Second, it is unclear what questions, if any, applicants in that case were asked. It is quite likely that employers ascertained the race of applicants by "visual surveys" rather than direct inquiries especially in the restaurant business where job seekers normally apply in person and are interviewed right away. Finally, the racial data collection system in *Alioto's* was expressly in furtherance of a racial "goals" system which is now (in 1999) clearly unconstitutional. (See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 497-500, 504 (1989).)[10]

In short, no reported case has ever held or even indicated that direct pre-employment racial inquiries serve any governmental interest. Each year, in California alone, this form of inquiry subjects hundreds of thousands of applicants to unequal treatment in violation of the Equal Protection Clause of the federal Constitution. Consequently, laws, such as Section 1233, plainly present an "important question of federal law that has

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[10] See also CAL. CONST., Art. I, Section 31, enacted in 1996 as Proposition 209, prohibiting racial discrimination of any kind by any state or local government in California, including the one form of "reverse discrimination" which this Court left available as an *option* in *Croson*, *ante*, to those governments which specifically demonstrate their own prior involvement in racial discrimination.

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not been, but should be, settled by this Court". (Supreme Court Rule 10(c).)

IV. PRE-EMPLOYMENT RACIAL INQUIRIES UNDERMINE THE EQUAL PROTECTION CLAUSE, THE CIVIL SERVICE, AND THE PUBLIC SAFETY.

The Equal Protection Clause serves this nation in at least three ways: (1) it establishes a basic fairness between persons and the law by insuring that, as each person is equally obligated to obey the law, so too must the law protect each person equally; (2) it promotes social peace by encouraging Americans to think of one another as individuals on the merits rather than as separate group members; and (3) it aids the public safety by insuring that only the *most* qualified persons work in the civil service. By injecting the impertinent issue of race into the public hiring process at its earliest and least conspicuous stage, direct pre-employment racial inquiries undermine the Equal Protection Clause in each of these three ways .[11]

The remainder of this section will address how heavily the public safety depends upon a rigorous enforcement of the Equal Protection Clause. As noted, *supra*, at 10, pre-employment racial inquiries deprive every government which uses them of the guarantee that

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[11] For example, were this Court to make such inquiries of applicants for its law clerk positions, it would thereby: (1) indicate to them that, although equally obligated to follow this Court's holdings, they were now subject to unequal treatment by it; (2) produce resentment as applicants reasonably conclude they might no longer be judged on merit alone; and (3) reduce the quality of the decisions which this Court provides to the nation.

it will select the *most* qualified applicants for oral interviews in its hiring process. The loss of this guarantee jeopardizes the lives of countless people who every day depend upon the competence of the civil service in this country. The conduct of every peace officer, firefighter, road worker, bus driver, engineer, medical worker, teacher, and every other worker, employed by the government, is critically important to the safety of the public (as well as those workers, themselves).

Since the early 1970's many state and local governments have dangerously de-emphasized hiring the *most* qualified job applicants in their pursuit of more "diverse" work forces. For example, it was the policy of Mountain View to assign "'plus factors'" to "gender and ethnicity status . . . in choosing between *relatively* equally well-qualified candidates, *particularly* in cases of underrepresentation." (CT 673-674 (emphases added).) It is now clear that sacrificing *any* competence in public hiring at the altar of racial "diversity" serves no one because it undermines the critical interest which we all have in the public safety.[12]

There were, however, three decisions of the Court in the 1970's and 1980's, before *Adarand, supra*, which suggest that competence can sometimes be subordinated to racial considerations. (See *Regents of University of*

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[12] For example, there is nothing but detriment to the parents of a child (of Race A) who is injured on a bus that crashes because their school district selected as its driver someone (also of Race A) who was other than the most qualified applicant for that position. Indeed, even that driver does not benefit from such a selection.

California v. Bakke, 438 U.S. 265 (1978)(public universities may consider race as a "plus" factor in the selection of their student bodies);[13] *Johnson v. Transport. Agency, Santa Clara County*, 480 U.S. 616, 620 (1987)(governments may consider gender and race as "plus" factors in the promotion of their public employees into a "traditionally segregated job classification"); and *City of Richmond v. J.A Croson Co.*, 488 U.S. 469 (1989)(governments may engage in "reverse discrimination" to remedy their own prior involvement in discrimination).)

These cases raise two questions. First, to what extent, if any, do they survive *Adarand, supra*? More specifically, does it ever serve a compelling interest (in a narrowly tailored manner) to endanger the public safety of everyone by selecting less qualified applicants to: (a) increase the racial "diversity" of a professional school's student body;[14] (b) reduce patterns of underrepresentation in some job classifications; or (c) remedy prior acts of official discrimination?[15]

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[13] Although *Bakke* did not involve public employment, it did involve a medical school in which the Court noted that "the training is centered on professional competency." (*Id.*, at 313.) The use of race to reject those most qualified to become competent doctors clearly diminishes the health and safety of all Americans of every race.

[14] Interestingly, California amended its state constitution in 1996 (i.e., Proposition 209) to expressly prohibit its public universities from pursuing such a goal. (CAL. CONST., Art. I, Section 31.)

[15] Governments have a compelling interest in remedying their own racial discrimination but not by endangering persons of every race.

Second, how precisely may "plus" factors be used in public hiring? May they only be used when applicants are exactly equally qualified for a position or may they also often be used to select less qualified applicants?[16] In both events the interests in equity and social peace, which the Equal Protection Clause serves, are deeply offended. But in the latter event the interest which every American has in the public safety is also put in jeopardy. The lack of a clear answer to this question is unsettling.

While neither *Bakke*, *Johnson*, nor *Croson*, *supra*, involved the use of direct pre-employment racial inquiries by a government in its public hiring, they do provide this Court with strong additional reasons for granting this petition. Specifically, they: (1) reveal the various uses to which governments have put racial inquiries in the past; (2) raise important questions about the use of racial inquiries by governments in the future; and (3) show a need to emphasize how well the Equal Protection Clause serves the compelling interest which Americans of every race have in the public safety.

No reported opinion has reviewed the constitutionality of pre-employment racial inquiries in the public hiring process which began in the 1970's. In fact, the

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[16] See Mountain View's vague description of its "plus factors" policy at page 21, *ante*. It based that policy expressly on *Johnson*, *ante*. (CT 674.) At one point that case suggests a government need not hire the most qualified applicant as long as it hires a "'fully qualified [one] . . . [e]specially where the job is an unexceptional, middle-level craft position'". (480 U.S. at 641, n. 17.) The public safety, however, depends on every civil servant. For example, any file clerk who loses a safety record endangers the public safety.

State in this case requested that the opinion of the California Court of Appeal, upholding racial inquiries, be published. Yet such inquiries continue to divisively and dangerously inject race into the public hiring process without a single reported judicial comment or review. (*Cf.* App., *infra*, 11a.)

A review of the constitutionality of direct pre-employment racial inquiries in the public hiring process is now urgently needed because they: (1) subject millions of job applicants to unequal treatment; (2) increase color consciousness rather than color blindness; and (3) endanger the public safety of millions of Americans each year.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

September 14, 1999

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[APPENDIX A]

Opinion of the California Court of Appeal [A Reprint]

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

FILED
Court of Appeal-First App. Dist.
APR 09 1999
RON D. BARROW, CLERK

JOHN K. HAGGERTY,

Plaintiff and Appellant,

v.

STATE OF CALIFORNIA et al.,

Defendants and Respondents.

A082581

(City and County of San Francisco Super. Ct. No. 988002)

This appeal by plaintiff John Haggerty involves a facial challenge to the constitutionality of Government Code section 1233 (section 1233), which authorizes public agencies to ask job applicants and employees to voluntarily disclose information about their ethnic identification, provided the information is used solely for research and statistical purposes. Section 1233 also specifically prohibits use of the information to discriminate against or give preference to a person identified as a member of an ethnic, racial, or religious

group on the basis of that group membership. The trial court rejected the constitutional challenge and granted defendants' motion for judgment on the pleadings, and we affirm the judgment.

PROCEDURAL BACKGROUND

In July 1997, plaintiff filed a complaint for declaratory and injunctive relief against the State of California (State) and the City of Mountain View (City). Plaintiff alleged that in November 1996, when he applied to the City for an advertised position as deputy city attorney, the City sent him a form asking for information about his ethnic identity; later, after he inquired about the form, the City told him that section 1233 authorized the voluntary collection of the information.

The full text of section 1233 is as follows:

> "Acting in accordance with Executive Order 11246 (30 FR 12319), as amended, applicants for employment by, and incumbent employees of, public agencies may be solicited to voluntarily declare their ethnic identification, provided this information shall be used for research and statistical purposes only. Notwithstanding the provisions of this section, it shall be unlawful, for purposes of any appointment, hiring, or promotion, to use this information to discriminate against a prospective or incumbent employee or to give preference to a person identified as a member of an ethnic, racial, or religious group upon the basis of such membership or identification.
>
> "A separate or tear-off portion of the application shall be written and shall be kept in a separate nonpublic file, accessible only to those

charged by the personnel director with research responsibility, for the purpose of discharging that responsibility. The separate sheet or tear-off may contain a number to be used as a cross index to the application. Safeguards to prevent misuse of the information shall be approved by the State Fair Employment Practice Commission, including the point in time at which the separate sheet or tear-off portion of the application shall be maintained in separate nonpublic file. As used in this section, 'public agency' means every city, county, and city and county whether chartered or not and every district." (Stats. 1974, ch. 573, Section 1.)

Plaintiff sought a declaration that section 1233 and the regulations adopted to implement it are unconstitutional in that they "seek to establish a racial classification system without a compelling and legitimate governmental interest; and . . . are not narrowly tailored to serve any such interest in that they actually increase the risk of racial discrimination." He also sought to enjoin the State from authorizing governmental agencies to ask job applicants to classify themselves racially and to enjoin the City from asking its applicants to do so.

The State moved for judgment on the pleadings and the City joined in the motion. The court granted the motion and judgment was entered dismissing the action with prejudice.

DISCUSSION

We begin by emphasizing the precise issue in this appeal. Plaintiff has made a facial challenge to section 1233, seeking a declaration that it is unconstitutional and unenforceable. A facial challenge involves consideration

only of the statutory text, not its past or future application to a particular individual or group. (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084.) To support a determination of facial unconstitutionality, thereby voiding the entire statute, a party cannot prevail by suggesting that in some hypothetical situation problems may arise as to the statute's application. Instead, the party must demonstrate that the statute's provisions inevitably pose a present total and fatal conflict with the applicable constitutional provisions. (*Arcadia Unified School Dist. v. State Dept. of Education* (1992) 2 Cal.4th 251, 267.)

We also emphasize that the outcome of this case does not depend on a resolution of disputed issues of fact. A motion for judgment on the pleadings is analogous to a general demurrer and the same standard of review applies. (*Hightower v. Farmers Ins. Exchange* (1995) 38 Cal.App.4th 853, 858.) This court must determine independently whether the facts alleged and the matters that may be judicially noticed entitle the defendants to judgment as a matter of law. (Code Civ. Proc., Section 438, subds. (c)(B)(ii) & (d); *Schabarum v. California Legislature* (1998) 60 Cal.App.4th 1205, 1216.)

Plaintiff's primary contention is that section 1233 is unconstitutional on its face in that it violates the equal protection clauses of the Fourteenth Amendment to the United States Constitution and article I, section 7 of the state Constitution.

Equal protection analysis requires a reconciliation of the constitutional promise that no person shall be denied the equal protection of the laws with the practical

reality that most legislation classifies for one purpose or another, with resulting advantage or disadvantage to various groups or persons. (*Romer v. Evans* (1996) 517 U.S. 620, 631.) "Individuals receive, or correspondingly are denied, governmental benefits on the basis of income, disability, veteran status, age, occupation and countless other grounds." (*Coalition for Economic Equity v. Wilson* (9th Cir. 1997) 122 F.3d 692, 702.) As a general rule, such legislative classifications are presumptively valid. If the law neither burdens a fundamental right nor targets a suspect class, a court will uphold the classification as long as there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. (*Heller v. Doe* (1993) 509 U.S. 312, 319-320; *Board of Supervisors v. Local Agency Formation Com.* (1992) 3 Cal.4th 903, 913.) When such a classification is based on a suspect class such as race, the court must apply strict scrutiny and uphold the legislation only if it is a narrowly tailored measure that furthers compelling governmental interests. (See, e.g., *Adarand Constructors, Inc. v. Pena* (1995) 515 U.S. 200, 218-219, 227, 229-230 [remedial race-based classification benefiting group that has suffered discrimination is subject to strict scrutiny].)

Plaintiff insists that the strict scrutiny test applies here, but he overlooks the first prerequisite to a meritorious equal protection claim, a showing that the state has adopted a classification that affects similarly situated groups in an unequal manner. (*In re Eric J.* (1979) 25 Cal.3d 522, 530.) An equal protection challenge to a law necessarily asserts that the law in some way treats similarly situated persons or groups

disparately. (*Guevara v. Superior Court* (1998) 62 Cal.App.4th 864, 871-872; *Ameri-Medical Corp. v. Workers' Comp. Appeals Bd.* (1996) 42 Cal.App.4th 1260, 1285; *Stubblefield Construction Co. v. City of San Bernardino* (1995) 32 Cal.App.4th 687, 713-714.) "A denial of equal protection entails, at a minimum, a classification that treats individuals unequally. [Citation.]" (*Coalition for Economic Equity v. Wilson, supra,* 122 F.3d at p. 707.) Absent this threshold showing, an equal protection claim necessarily fails. (See *Ameri-Medical Corp. v. Workers' Comp. Appeals Bd., supra,* at p. 1285.)

Arcadia Unified School Dist. v. State Dept. of Education, supra, 2 Cal.4th 251 is illustrative. Plaintiff mounted a facial challenge on state equal protection grounds to a statute authorizing school districts to charge fees for pupil transportation. Plaintiff argued that the statute should be subjected to strict scrutiny because it discriminated against poor students and created a classification based on wealth that would affect children's ability to exercise their fundamental right to education. The Supreme Court suggested that plaintiff's claims might have merit if the statute were to be applied in such a way as to prevent children from attending school because they could not pay the fee. But because the challenge was to the facial validity of the statute, the court's task was limited to determining whether it could be constitutionally applied. The court pointed out that the statute itself specifically exempted indigent children from paying the fees, and it reasoned in part that if the statute was properly administered, no child would be denied transportation to school because of poverty. (*Id.*

at pp. 266-267.) In other words, properly applied, the statute did not authorize unequal treatment of students. Because the statute on its face did not present a total and inevitable conflict with the constitutional promise of equal protection, no analysis of the reasons for its enactment was required.

Although section 1233 authorizes public agencies to ask job applicants to voluntarily disclose information about their ethnic identification for statistical or research purposes, it does not allow or impliedly condone disparate treatment for any particular racial group. On the contrary, it specifically forbids use of this information either to discriminate or to give preference and provides that the information is to be kept in a separate nonpublic file, accessible only to those charged with research responsibility. On its face, section 1233 simply does not create a classification treating similarly situated persons unequally, and plaintiff's equal protection challenge necessarily fails. For similar reasons, plaintiff cannot prevail on his claim that the statute is invalid in that it violates the state constitutional prohibition against discrimination and preferential treatment on the basis of race (Cal. Const., art. I, section 31); the constitutional ban and the statute are counterparts, not opposites.

Despite the statute's unambiguous prohibition against race-based discrimination or preference, plaintiff argues that it increases the risk of discrimination because it authorizes local governments to apprise themselves of the race of job applicants "at the earliest and least conspicuous stage of the hiring process." But on a facial challenge, plaintiff cannot prevail by suggesting that

problems may arise or have arisen as to the statute's application in a particular situation. (*Tobe v. City of Santa Ana, supra*, 9 Cal.4th at p. 1084.) Courts considering statutes or ordinances calling for the collection of information on race in other contexts generally have held that the collection of such data is reasonable; the hypothetical possibility of misuse of the information does not require the invalidation of reasonable procedures to acquire the information, as any actual misuse is subject to judicial scrutiny. (See, e.g., *Alioto's Fish Co. v. Human Rights Com. of San Francisco* (1981) 120 Cal.App.3d 594, 609-610; *Caulfield v. Board of Ed. of City of New York* (2nd Cir. 1978) 583 F.2d 605, 610-611; *United States v. State of N.H.* (1st Cir. 1976) 539 F.2d 277, 279-280.) Because plaintiff has not shown that section 1233 cannot be applied constitutionally, his equal protection challenge fails. (See *Arcadia Unified School Dist. v. State Dept. of Education, supra*, 2 Cal.4th at p. 267.)[1]

We have not overlooked plaintiff's argument concerning his declaration in opposition to the motion for judgment on the pleadings. Attached to that declaration were numerous documents, including legislative history materials, copies of documents already attached as exhibits to his complaint, the City's discovery responses concerning its hiring practices and

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[1] Plaintiff states in passing that section 1233 also violates article I, section 1 of the state Constitution, which includes the right of privacy. But this assertion is not supported by any argument, analysis, discussion, or citation of authority, and we will not consider it.

other matters, and material from the federal Equal Employment Opportunity Commission. Defendants objected to the declaration on the ground that a motion for judgment on the pleadings is limited to the face of the pleading and matters judicially noticed. Although plaintiff does not inform us how the trial court ruled on that objection, he now urges us to consider his declaration and all the attached documents in their entirety. But we need not analyze the abstract question of whether any of those documents was properly the subject of judicial notice for purposes of a motion for judgment on the pleadings, because plaintiff has made no showing of their relevance or significance to his facial challenge to section 1233.

Finally, we note that even if the City once required job applicants to submit an ethnic identity form with their job application, it is undisputed that when plaintiff filed his complaint, the City's form comported with the statute by indicating that submission was voluntary.[2] Whether the City previously violated the statute by making the form mandatory is not at issue in this case, as plaintiff was not seeking an injunction ordering the City to comply with section 1233. Instead, as we have discussed, he sought to preclude the City from soliciting the information at all, on the ground that section 1233 is unconstitutional. Our rejection of plaintiff's facial

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[2] When plaintiff filed his complaint, the City was no longer requiring submission of the form. Attached to his complaint as an exhibit was a letter to him from the city attorney, stating that as a result of plaintiff's inquiry and its own research, the City would continue to collect the data, but make completion of its form voluntary.

challenge to the statute is dispositive of his claim for injunctive relief against the City.

The judgment is affirmed.

s/_____
Strankman, P.J.

We concur:

s/_____
Swager, J.

s/_____
Marchiano, J.

[APPENDIX B]

Denial of Petition for Review by Supreme Court of California [A Reprint]

First Appellate District, Division One, No. A082581
S078314

IN THE SUPREME COURT OF CALIFORNIA

JOHN K. HAGGERTY, Appellant

v.

STATE OF CALIFORNIA
Et Al., Respondents

SUPREME COURT
FILED
JUN 30 1999
Robert Wandruff, Clerk
DEPUTY

Appellant's petition for review DENIED.
The request for an order directing publication of the opinion is denied.

s/_____
Chief Justice

[APPENDIX C]

Judgment of the Trial Court

[A Reprint w/o Drafting Attorney's Address]

FILED
FEB 26 1998
ALAN CARLSON, CLERK

SUPERIOR COURT OF THE STATE OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO

JOHN K. HAGGERTY,	)	No. 988002
	)	
Plaintiff,	)	JUDGMENT OF
	)	DISMISSAL
v.	)	
	)	
THE STATE OF CALIFORNIA;	)	
CITY OF MOUNTAIN VIEW;	)	
and DOES 1 through 100,	)	
inclusive,	)	
	)	
Defendants.	)	
	)	

WHEREAS, the Court having issued its Order Granting Motion for Judgment on the Pleadings without leave to amend,

NOW THEREFORE, IT IS ORDERED, ADJUDGED, and DECREED, that:

1. This action shall be, and hereby is, DISMISSED WITH PREJUDICE;

2. Plaintiff John K. Haggerty shall take nothing by this action; and,

3. All parties shall bear their own costs of suit.

Dated: FEB 23 1998 s/_____
Honorable David A. Garcia
JUDGE OF THE SUPERIOR COURT

Dated: February 11, 1998

s/_____
Approved as to form by Plaintiff
John K. Haggerty

Dated:

s/_____
Approved as to form by Defendant
City of Mountain View

[APPENDIX D]

Order of the Trial Court Granting Motion for *Judgment*
[A Reprint w/o Drafting Attorney's Address]

FILED
FEB 26 1998
ALAN CARLSON, CLERK

SUPERIOR COURT OF THE STATE OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO

JOHN K. HAGGERTY,	)	No. 988002
	)	
Plaintiff,	)	ORDER GRANTING
	)	MOTION FOR
v.	)	JUDGMENT ON
	)	THE PLEADINGS
THE STATE OF CALIFORNIA;	)	
CITY OF MOUNTAIN VIEW;	)	
and DOES 1 through 100,	)	
inclusive,	)	
	)	
Defendants.	)	
	)	

WHEREAS, Defendant State of California's ("State's") motion for judgment on the pleadings, and Defendant City of Mountain View's ("Mountain View") joinder in said motion for judgment on the pleadings was set for hearing in the Law and Motion Department on February 10, 1998; and,

WHEREAS, the Court issued its tentative ruling granting the motion for judgment on the pleadings without leave to amend; and,

WHEREAS, the parties have waived oral argument, and are willing to submit the matter based on the tentative ruling;

NOW THEREFORE, the Court rules as follows:

1. The State's motion for judgment on the pleadings in its favor on all causes of action in the complaint, and Mountain View's joinder in said motion, is hereby GRANTED without leave to amend on the ground that the complaint does not state facts sufficient to constitute a cause of action against the State and/or Mountain View.

2. Judgment of dismissal shall be entered in accordance with this Order pursuant to Code of Civil Procedure section 438(h)(3).

3. All parties shall bear their own costs of suit herein.

Dated: FEB 23 1998 s/_____

Honorable David A. Garcia
JUDGE OF THE SUPERIOR COURT

Dated: February 11, 1998

s/_____

Approved as to form by Plaintiff
John K. Haggerty

Dated: 2/17/98

s/_____

Approved as to form by Defendant
City of Mountain View

[APPENDIX E]

Text of California Government Code Section 1233

"Acting in accordance with Executive Order 11246 (30 FR 12319), as amended, applicants for employment by, and incumbent employees of, public agencies may be solicited to voluntarily declare their ethnic identification, provided this information shall be used for research and statistical purposes only. Notwithstanding the provisions of this section, it shall be unlawful, for purposes of any appointment, hiring, or promotion, to use this information to discriminate against a prospective or incumbent employee or to give preference to a person identified as a member of an ethnic, racial, or religious group upon the basis of such membership or identification.

A separate or tear-off portion of the application shall be written and shall be kept in a separate nonpublic file, accessible only to those charged by the personnel director with research responsibility, for the purpose of discharging that responsibility. The separate sheet or tear-off may contain a number to be used as a cross index to the application. Safeguards to prevent misuse of the information shall be approved by the State Fair Employment Practice Commission, including the point in time at which the separate sheet or tear-off portion of the application shall be maintained in separate nonpublic file. As used in this section, 'public agency' means every city, county, and city and county whether chartered or not and every district."

[APPENDIX F]

Texts of Two Related California Regulations

California Code of Regulations, Title 2, Section 7287.0(b):

"Applicant Identification Records. Unless otherwise prohibited by law and for recordkeeping purposes only, every employer or other covered entity shall maintain data regarding the race, sex, and national origin of each applicant and for the job for which he or she applied. If such data is to be provided on an identification form, this form shall be separate or detachable from the application form itself. Employment decisions shall not be based on whether an applicant has provided this information, nor shall the applicant identification information be used for discriminatory purposes, except pursuant to a bona fide affirmative action or non-discrimination plan.

(1) For recordkeeping purposes only, 'applicant' means any individual who files a formal application or, where an employer or other covered entity does not provide application forms, any individual who otherwise indicates to the employer or other covered entity a specific desire to be considered for employment. An individual who simply appears to make an informal inquiry or who files an unsolicited resume upon which no employment action is taken is not an applicant.

(2) An employer or other covered entity shall retain the original documents used to identify applicants, or keep statistical summaries of the collected information.

(3) Applicant records shall be preserved for the time period set forth in Section 7286.9(c)(1) and (2)."

California Code of Regulations, Title 2, Section 7287.3(b)(2), (c):

"[b](2) Applicant Flow and Other Statistical Recordkeeping. Notwithstanding any prohibition in these regulations on pre-employment inquiries, it is not unlawful for an employer or other covered entity to collect applicant-flow and other recordkeeping data for statistical purposes as provided in Section 7287.0(b) of these regulations or in other provisions of state and federal law.

(c) Applications:

(1) Application Forms. When employers or other covered entities provide, accept, and consider application forms in the normal course of business, in so doing they shall not discriminate on a basis enumerated in the Act.

(2) Photographs. Photographs shall not be required as part of an application unless pursuant to a permissible defense.

(3) Separation or Coding. Application forms shall not be separated or coded or otherwise treated so as to identify individuals on a basis enumerated in the Act unless pursuant to a permissible defense or for recordkeeping or statistical purposes."